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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOHUMIL J. DUSANEK,

Petitioner,

vs.

JOHN O'DONNELL, M.D., and the BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a tenured public school teacher may be forced to take an illness leave of absence for failing to meet the medical standards of his employer without being told any reasons for his failure to meet such standards.

2. Whether the failure of a tenured public school teacher to submit himself to a hearing for dismissal for cause from his employment bars him from commencing suit in federal court for a denial of due process in forcing him to take an illness leave of absence for reasons which are not disclosed to him.

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BOHUMIL J. DUSANEK,

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vs.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: The Justices of the Supreme Court of the United States:

Petitioner, Bohumil J. Dusanek, respectfully prays that a Writ of Certiorari issue to review the decision and order of the United States Court of Appeals for the Seventh Circuit, reversing the decision of the United States District Court for the Northern District of Illinois.

Petitioner, Bohumil J. Dusanek, is a tenured teacher employed by the Board of Education of the City of Chicago, Illinois. He was required to undergo a psychiatric examination by a doctor employed by the Board. Subsequent to the examination he was informed, without explanation, that he did not meet the medical standards

of the Board of Education. He was informed that he should take an illness leave of absence and that if he did not, the Board would bring charges against him seeking his dismissal for cause.

Petitioner placed himself on an illness leave of absence and filed suit in the United States District Court for the Northern District of Illinois pursuant to 42 U.S.C. §1983, alleging deprivation of due process and equal protection. After a jury trial, judgment was rendered for Petitioner in the amount of $100,000.00 against Respondents. The United States Court of Appeals for the Seventh Circuit reversed, finding that since Petitioner took the illness leave of absence and had not submitted himself to a dismissal hearing for cause, he had not been denied any property rights without due process.

Petitioner's Petition for Rehearing was denied.

OPINIONS BELOW

The United States District Court for the Northern District of Illinois rendered no opinion in entering judgment for Petitioner in the amount of the jury verdict, plus costs and attorneys fees. The Order rendering judgment is attached hereto as Exhibit A. The opinion of the United States Court of Appeals for the Seventh Circuit, rendered on April 26, 1982, is reported at 677 F.2d 538 (1982). That Opinion is reproduced as Appendix B to this Petition. The Court of Appeals rendered no opinion in denying Petitioner's Petition for Rehearing. The Order denying that Petition is attached hereto as Appendix C.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit denied Petitioner's Petition for Rehearing on June 28, 1982. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATEMENT OF FACTS

Bohumil J. Dusanek began his employment as a teacher with the Board of Education of the City of Chicago in September, 1958. In 1961, he obtained a regular certificate and was appointed to a full-time position as a teacher of Business Education. Petitioner subsequently obtained tenure pursuant to the Illinois School Code, Ch. 122, Ill. Rev. Stats. §34-85.

From September 1964, through March, 1977, Petitioner was assigned to a teaching position at the Schurz High School. For each of those thirteen years Petitioner received "excellent" or "superior" ratings of his teaching ability by the Principal based on the latter's observations of his actual performance.

On March 2, 1977, Mr. Dusanek brought the name of a student, Laura Callan, to the Principal's attention due to the student's record of excessive absences, alternating with periods of disruptive attendance. Petitioner also informed the Principal of his belief that he recognized Laura Callan as being a student who had previously attended his class during 1967, 1968 or 1969, often in the company of a tall girl dressed in bib overalls. He recalled the pair as being disruptive to the class. Dr.

Maloney directed Petitioner to summarize his observations in a memo, which he did.

By reviewing school records, Dr. Maloney determined Laura Callan's date of birth to have been in April, 1960, making it unlikely that she had been at Schurz during the time period Petitioner recalled. Dr. Maloney then conducted an "investigation" of Mr. Dusanek's behavior. This investigation consisted only of canvassing members of the school staff as to rumors about the Petitioner. Two teachers, Mr. Preo and Mrs. Horan, each reported an incident, both of which were alleged to have occurred approximately ten years earlier. Although without personal knowledge as to the truth of these statements, Dr. Maloney concluded the investigation, discussing neither of them with Petitioner.

Based on the single conversation which he had with Petitioner regarding Laura Callan and those reported incidents of Petitioner's behavior a decade earlier, Dr. Maloney requested a complete health examination for Petitioner (both physical and mental) by the Board's Bureau of Teacher Personnel pursuant to Board Rule 4-44, which provides in pertinent part:

> "The General Superintendent . . . shall have authority to require a health examination by a medical examiner selected by him of any employee under his control or supervision whenever, in his judgment, there seems to exist any disability which might impair the efficiency of such employee. . . ."

The principal's request that Petitioner be scheduled for a health examination was received by Raymond C. Principe, Director of the Board's Bureau of Teacher Personnel. When he received this request, he knew nothing of the nature of the supposed disability of Petitioner which might impair his efficiency, nor the nature of the examination being requested. Mr. Principe directed his secretary to prepare a form letter dated

March 14, 1977, for signature by the General Superintendent of Schools, directing Petitioner to report to the Board's offices on March 28, 1977, for a "health examination." The letter contained no explanation of the term "health examination". The form letter was submitted to the General Superintendent for signature unaccompanied by any written or oral communication apprising the Superintendent of any facts or reasons justifying the initiation of the request for examination. The communication to Petitioner specified neither reasons for the directive nor standards by which Petitioner would be measured in the evaluation of his "health."

According to the Director of Teacher Personnel, the medical standard for teaching in the Chicago Public Schools is enunciated in Board Rule 44-4, which allows a principal to request a health examination when he is of the opinion that an employee has a disability which affects his efficient performance.

Respondent Dr. John O'Donnell is employed by the Board of Education as a consulting psychiatrist. He conducted psychiatric portions of health examinations ordered pursuant to Board Rule 44-4 by interviewing teachers and rendering psychiatric evaluations. Dr. O'Donnell commenced his evaluation of Petitioner by telephoning the Principal to discuss the reason for the Dusanek referral. Dr. O'Donnell's examination of the Petitioner consisted of asking Mr. Dusanek if he knew why he had been summoned to an examination, questioning Petitioner about some of the incidents related to him by the Principal, and inquiring of him as to his interests and hobbies. Dr. O'Donnell also "questioned him about other things, not too specifically." This examination lasted approximately forty-five minutes.

During the examination Dr. O'Donnell requested that Mr. Dusanek execute releases to enable Dr. O'Donnell to

speak with Petitioner's orthopedic surgeon and psychiatrist, which Petitioner did. Prior to making the determination that Petitioner should be relieved of his teaching duties and directed to take a leave of absence, Dr. O'Donnell did not consult with Petitioner's psychiatrist, Dr. Garth Smith.

Based solely on the above-described "examination" and the history received from the Principal, Dr. O'Donnell concluded that Petitioner did not get along with the Schurz School staff and could not develop healthy personal relationships with his students. Dr. O'Donnell at no time actually observed Petitioner's behavior in the classroom, or in any context other than his office interviews. Dr. O'Donnell discussed Petitioner's teaching performance and professional demeanor with no one other than the principal and Petitioner himself. Thereafter, Petitioner was advised that he did not meet the medical standards for teaching in the Chicago School system. Petitioner immediately wrote a letter to Medical Director Dr. Abrams, dated April 5, 1977, in which he requested an opportunity to discuss the examination and asked "why have I failed?". He received no response.

Following Petitioner's request for a re-examination, in July, 1977, Dr. O'Donnell conducted a second evaluation of Mr. Dusanek. At the conclusion of the examination, which was conducted in the same manner as the first, Dr. O'Donnell concluded that Petitioner's "delusional system had spread with regard to the principal and the school," and that he did not meet the Board's standards for teaching. At no time did Dr. O'Donnell identify for Mr. Dusanek the "emotional problems" from which Dr. O'Donnell concluded Petitioner suffered and which supposedly impaired his ability to teach. Nor did he advise Mr. Dusanek of what was required of him in order to remedy his deficiencies to meet the Board's medical standards.

At trial, Dr. O'Donnell testified that Mr. Dusanek would "have problems" if he were allowed to continue teaching, but could not state or predict any specific problems. Dr. O'Donnell admitted that persons who have psychiatric or emotional problems should not necessarily be precluded from teaching school solely on the existence of those emotional problems. He further testified that he made no diagnosis or prognosis of Petitioner's condition, despite the fact that he understood that on the strength of his report Petitioner would be prevented from teaching in the Chicago Public Schools until such future time as he successfully passed a health examination or conditions had changed.

Following Petitioner's second examination by Dr. O'Donnell in July, 1977, Principe informed Petitioner by letter dated August 19, 1977, that he still "did not meet the medical standards required for teaching in the Chicago Public Schools." Pursuant to the Board directive and along with this notification, Petitioner received a form to be used to request an illness leave of absence. The notification to him stated that if he did not execute the request for illness leave of absence within ten business days, it would be recommended to the Board of Education that his services be terminated in accordance with State statute.

The applicable state statute, Ch. 122, Ill. Rev. Stats. §34-85, provided at the time that charges for dismissal be preferred by a vote of the majority of the Board of Education, which then would appoint a committee of three of its members to hold a hearing thereon. Believing his job to be in jeopardy, Mr. Dusanek at that time executed the Request for Illness Leave of Absence. His uncompensated leave of absence became retroactively effective as of March 29, 1977.

Illness leaves of absence from active duty in the Chicago public schools are defined and controlled by the

language of Board Rule 4-44 and Article 33 of the collective bargaining agreement between the Board of Education and the Chicago Teachers Union. Leaves of absence are granted under this rule in periods of five school-month blocks, to a maximum of twenty-five school months. A teacher on an illness leave may terminate the leave prior to the natural expiration of the five-month period only by written request to and approval of the Department of Personnel. Upon return from a leave of a duration in excess of five school-months, a teacher is required to pass a health examination performed by the Board's medical department. If he does not pass such examination, the teacher may request an additional medical opinion in the manner provided in Board Rule 4-19. Resort to the Rule 4-19 procedure which guarantees an impartial medical opinion is available under Rule 4-33 only to a teacher seeking reappointment after the expiration of the initial five-month leave period.

Pursuant to Rule 4-33 and other contractual provisions, certain benefits inure to a teacher while on an approved illness leave of absence. The teacher is entitled to the payment by his employer of the full premium cost of insurance, individual or family insurance plans, (Art. 32); that portion of the leave for which sick pay is received is not considered to be a break in service for any purpose; the entire leave is not to be construed as a break in service for seniority purposes; the teacher's position is protected for the first five-month period; after five months the position is declared vacant, but the teacher retains entitlement to immediate reassignment to a vacant position equal in rank upon return to active service.

No extensions of leave are granted beyond a total of twenty-five school months. At the end of that period a teacher may request reappointment, which is conditioned upon the successful passing of a health examina-

tion. Alternatively, a teacher may resign. If the teacher refuses to resign he is charged with being "absent without leave", is deemed to have abandoned his employment and to have surrendered all rights of tenure and is subject to summary dismissal from the Board. (Rule 4-41).

On October 27, 1977, Petitioner filed suit in the United States District Court for the Northern District of Illinois, pursuant to 42 U.S.C. §1983 alleging that the Board, through its employees, had deprived him of property in his employment without due process of law. On May 6, 1980, after trial, the jury rendered a verdict in favor of Petitioner against the Board and Dr. O'Donnell in the sum of $100,000.00. Judgment was rendered on the verdict, and Petitioner was subsequently granted attorneys fees by the District Court.

On appeal, the United States Court of Appeals for the Seventh Circuit reversed. While that Court did not find that the verdict of the jury was against the manifest weight of the evidence, it held that Petitioner had not been denied property without due process. The crux of the Court's opinion was a finding "that it is not a deprivation of due process of law to be put to the option of defending oneself in a proper dismissal hearing or voluntarily accepting a change in one's job status, when the state's action in first initiating the medical investigation is reasonable and in full compliance with the conditions of the teacher's tenure." The Court specifically held that requiring Petitioner to undergo a dismissal proceeding was not a requirement that he exhaust administrative remedies, but rather, that the State had made a procedural protection available to Petitioner which he had refused to utilize.

It is this ruling which Petitioner requests this Court to review.

REASONS FOR GRANTING THE WRIT

I.

A FORCED ILLNESS LEAVE OF ABSENCE IS A DEPRIVATION OF PROPERTY.

The touchstone of due process is fundamental fairness. Petitioner has been denied that basic fairness to which all persons are entitled from governmental employers. The jury in this case, pursuant to proper instructions, so found. In direct contravention of this Court's admonitions, the United States Court of Appeals has set aside that finding and verdict in Plaintiff's favor. The Court of Appeals has held that the illusion of due process is sufficient, even though its substance has been denied.

Last term this Court reaffirmed its unbroken series of holdings, again reiterating that resort to the Courts for redress of constitutional deprivations under 42 U.S.C. §1983 is not to be conditioned upon exhaustion of administrative remedies. *Patsy v. Board of Regents of the State of Florida*, ... U.S. ....., 102 S.Ct. 2557 (1982). Despite this reaffirmation of that long-established principle, the Court of Appeals has attempted to evade that principle by a neat piece of legerdemain. Such an evasion must not be countenanced by this Court if public employees are to retain their constitutional rights.

As is set forth more fully above, Petitioner is a tenured teacher within the Chicago Public School system. As such, he can be discharged from that employment only for "cause." Ch. 122, Ill. Rev. Stats. §34-85. Illinois law further declares that temporary medical disability is not a cause for discharge. Ch. 122, Ill. Rev. Stats., §10-22.4. In line with that statutory direction and guidelines for "just cause", the Chicago Board of Education has adopted rules and regulations which provide

that a teacher who is temporarily disabled due to illness is entitled to take an illness leave of absence, in periods of up to five months duration. Board of Education Rule 4-33. During that period of time, the teacher's position as an employee is protected, and certain fringe benefits continue to be provided, most notable of which is medical insurance coverage.

The ruling of the Court of Appeals here, however, decrees that where a teacher wishes to contest an attempt by the Board of Education to force him into taking such a leave of absence, he must relinquish those substantial benefits by testing that leave under the Tenure Dismissal Act. Ill. Rev. Stat. Ch. 122, §34-84 through 34-85. The Court of Appeals has held that the Board properly forced Petitioner to make an election—either take an illness leave of absence, or submit himself to dismissal from his position—with no standards whatsoever upon which to make such a serious decision.

Petitioner was notified that he was required to undergo a complete medical examination. When he arrived at the medical offices of the Board of Education, he was given a perfunctory physical examination, after which he was ushered into the presence of a psychiatrist. He was not told why he was there. After a short interview he was told to leave. Shortly thereafter he was informed that he did not meet the "medical standards" of the Board of Education. He was not told what those standards were. He was not told why he did not meet those standards. In fact, no such standards exist, either in writing or any other form. At best, those standards are what the doctor at the time solely decides.

He was then informed that if he did not submit to an illness leave of absence, the Board would move to dismiss him from his teaching position. Not knowing what he was charged with, or why he was being forced to make such a decision, Petitioner was put to a Hobson's

choice: either acquiesce to an illness leave of absence without pay, or face suspension from duty without pay until charges and a hearing could be held. He chose the option of taking an illness leave of absence, and filing this suit.

The jury found there was no reason for forcing Petitioner to take an illness leave of absence—i.e., the accusations against him were untrue. Yet, the Court of Appeals holds that by not submitting himself to an unrelated tenure dismissal hearing, he has forfeited his right to be heard in the courts. In short, the Court of Appeals would force Petitioner to give up certain statutory and contractual rights and benefits in order to obtain due process. Such an approach has been consistently condemned.

The decision of the Court of Appeals here is contrary to the spirit of the decisions of this Court, and the rulings of every other Circuit Court which has considered this issue. It holds that so long as the Board of Education was prepared to give Petitioner some kind of hearing, due process has been satisfied. But that is not the holding of this Court. The kind of process which is due depends upon the deprivation which is contemplated. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976).

It is now well settled "that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." *Fuentes v. Shevin*, 407 U.S. 67, 84, 92 S.Ct. 1983 (1972). The State of Illinois has recognized that temporary medical disability is not a cause for termination. 122 Ill. Rev. Stats. §10-22.4. In accord with that obviously correct policy, the Board of Education has promulgated its rule 4-33 which allows a teacher to seek a leave of absence, which must be passed upon by the Superintendent of Schools. Absence pursuant to such leave "shall not be construed as a break in service of such person on leave so far as senior-

ity of service is concerned . . . [and] shall not be construed as a break in service for any purpose." Board of Education Rule 4-33. In addition, such a person retains his tenure rights and continues to have his medical benefits insurance in force during the leave period as provided in the collective bargaining agreement between the Board of Education, City of Chicago and the Chicago Teachers Union, Article 32-1.1. Further, such medical benefits would *not* be available to Petitioner if he was suspended and charged with dismissal under Chapter 122, Ill. Rev. Stats. §34-85.

It is well established that before such a leave may be forced upon a person, due process is required. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791 (1974); *Lombard v. Board of Education*, 502 F.2d 631 (3d Cir. 1974). Before such a leave may be imposed, notice and a hearing which is likely to establish the validity of the deprivation is required. *Bell v. Burson*, 402 U.S. 535, 539-42, 91 S.Ct. 1586 (1971). No such opportunity was presented to Petitioner before he was required to decide whether to relinquish the rights attendant to a medical leave or face a dismissal hearing which might strip him of his career, tenure rights and future economic and medical benefits.

It is fundamental that a person may not be required to make an uniformed decision as to whether to relinquish a right. No system of justice can survive if it comes to depend on its citizens' forced abdication through unawareness of their constitutional rights. *Escobedo v. State of Illinois*, 378 U.S. 478, 490, 84 S.Ct. 1758, 1764 (1964). Notice of the reasons for a contemplated action is the first step of due process. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 574, 92 S.Ct. 2701, 2707 (1972). Here, Petitioner was required to decide whether to relinquish property rights which he would have on a leave of absence status without any information whatso-

ever as to why he did not meet the medical standards of the Board of Education, or what he would have to do in order to bring himself into compliance. Obviously, no one could make such a decision in an informed manner. Requiring such an election is a violation of the fundamental precepts of due process. *Freitag v. Carter*, 489 F.2d 1377, 1382 (7th Cir. 1973).

Furthermore, the very decision that Petitioner was mentally unqualified to meet the medical standards of the Board of Education adversely impacted his liberty. *Newman v. Board of Education of City School District of New York*, 594 F.2d 299, 305 (2d Cir. 1979). Certainly such an allegation would not only deprive Petitioner of present government employment, but also of future opportunity for employment there or elsewhere. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 185, 71 S.Ct. 624, 655.

The refusal of the Board of Education to inform Petitioner of any information which was the basis for the determination of mental unfitness to teach is the kind of egregious action against which the Constitution protects. As was found in *Newman v. Board of Education of City School Districts of New York, supra*, the failure to provide such vital information is a denial of rudimentary fairness. 594 F.2d at 305. See also *Freitag v. Carter, supra*, at 1382.

Clearly, the Court of Appeals has ignored this aspect of the case. It has taken a limited view of the requirements of due process which does not comport with the realities of the situation.

II.

EXHAUSTION OF REMEDIES IS NOT REQUIRED.

The Court of Appeals has turned the teachings of this Court upside down, holding that Plaintiff is barred from seeking relief from his constitutional deprivations by not having first submitted to the state administrative proceedings. Indeed, this opinion is in direct conflict with an earlier holding by a different panel of the same court in *Austin v. Board of Georgetown Community Unit School District No. 3*, 562 F.2d 446, 453 (7th Cir. 1977), where it was held that even had the Board of Education strictly complied with the state procedural scheme, it would be "totally irrelevant" to the citizen's constitutional rights. See also *Colaizzi v. Walker*, 542 F.2d 969 (7th Cir. 1976), *cert. den.*, 430 U.S. 960, 97 S.Ct. 1710 (1977).

As was said long ago by this Court:

> ". . . It is no answer that the state has a law which if enforced would give relief. The federal remedy [§1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 482 (1961).

The opinion of the Court of Appeals in this case is contrary to its own prior holdings, those of this Court and of other Circuits. Other circuits have long held that exhaustion of state remedies is not required if the inadequacy of the state administrative remedy is coextensive with the merits of the plaintiff's constitutional claim. *Jose P. v. Ambach*, 669 F.2d 865, 869 (2d Cir. 1982). Here, Petitioner's claim was indeed coextensive with his attack upon the Board of Education's procedures. To allow the merits of Petitioner's claim to be controlled by the decision upon the procedural aspect is to truly allow the tail to wag the dog. The search for justice and vindi-

cation of constitutional rights cannot become a procedural game where one loses if he selects the "wrong" procedural posture in which to place his case.

The Court of Appeals here made no finding that the verdict of the jury in this case was against the manifest weight of the evidence, or was otherwise improper or inappropriate. The jury's finding that Petitioner's due process rights were violated stands and is binding. Such a finding cannot be evaded by what amounts to playing semantic games with constitutional rights. This Court has unequivocally held in *Patsy v. Board of Regents of the State of Florida, supra*, that one need not exhaust administrative remedies before applying to the federal courts for protection of federal constitutional rights. To rely upon the law of the State of Georgia, as the Court of Appeals has done to avoid this decision, is both inexplicable and impermissible.

To allow this decision to stand will be a retrenchment and narrowing of *Patsy* and again reduce governmental employees' rights. This Court has handed down an unbroken string of decisions seeking to clarify those rights. A decision such as that below will only serve to again confuse the law and breed needless litigation. It cannot stand.

This Court should grant this Petition for Writ of Certiorari to once again affirm what it has in the past—public employees are entitled to due process and those rights will be protected by the federal courts.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Honorable Court to grant its Writ directed to the United States Court of Appeals for the Seventh Circuit, and upon doing so, to reverse the decision of that Court and reinstate the judgment of the United States District Court for the Northern District of Illinois in his favor.

Respectfully submitted,

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